

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY SESSION, 1996

**FILED**  
July 15, 1996  
Cecil Crowson, Jr.  
Appellate Court Clerk

**JAMES DAVID CARTER,**

Appellant,

**VS.**

**STATE OF TENNESSEE,**

Appellee.

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C.C.A. NO. 03C01-9506-CC-00179

**GREENE COUNTY**

**HON. JAMES E. BECKNER  
JUDGE**

(Post-Conviction)  
(Death Penalty)

**ON APPEAL FROM THE JUDGMENT OF THE  
CRIMINAL COURT OF GREENE COUNTY**

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OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

The Petitioner appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure from the trial court's dismissal of his third petition for post-conviction relief. The Petitioner was convicted on a jury verdict of first degree murder. He was sentenced to death by electrocution. The trial court denied the Petitioner post-conviction relief because two of the three issues had been previously determined and the third issue lacked merit. We affirm the judgment of the trial court.

The Petitioner was convicted of first degree murder in November of 1984. He had kidnaped the victim from a rest area, driven him to an area near Cherokee Lake and shot and killed him. The Petitioner attempted to push the victim's body off a bluff into the lake, but the body landed on a rocky ledge where it was subsequently found. The Petitioner unsuccessfully appealed his conviction to the Tennessee Supreme Court. State v. Carter, 714 S.W.2d 241 (Tenn. 1986), cert. denied, 479 U.S. 1046 (1987). The Petitioner then appealed to the United States Supreme Court and the Court denied certiorari. Tennessee v. Carter, 479 U.S. 1046 (1987).

The Petitioner then filed the first of his post-conviction petitions which was denied and then appealed to the Tennessee Court of Criminal Appeals. James David Carter v. State, No. 304 Greene County, (Tenn. Crim. App., Knoxville, filed Sept. 14, 1989). His first petition was unsuccessful. Id. The Petitioner's second post-conviction petition was filed prior to the time the Court of Criminal Appeals

had rendered a decision on his first petition. The trial court denied the Petitioner relief on the grounds that the issues argued had been previously determined. Carter v. State, 802 S.W.2d 223, 224 (Tenn. Crim. App. 1990), perm. to appeal denied (Tenn. 1991). On appeal from the trial court's decision, this court affirmed the denial of relief because the Petitioner had simultaneous actions pending in state courts. Id. at 225.

After the failure of his two post-conviction petitions, the Petitioner filed a petition for writ of habeas corpus with the United States District Court in the Eastern District of Tennessee in March of 1991. In November and December of 1994, the District Court granted summary judgment to the State concerning certain issues raised in the petition for writ of habeas corpus. Among the issues dismissed were the Middlebrooks issue and the Brady issue that are addressed herein. At the time this opinion in the case sub judice was written, the Petitioner had a pending issue remaining in the District Court concerning the ineffective assistance of counsel.

The Petitioner filed this, his third, petition for post-conviction relief on January 30, 1995. The issues in this petition were the Middlebrooks issue, concerning the application of the aggravating circumstance at Tennessee Code Annotated section 39-2-203(l)(7) (1982), the Brady issue, concerning certain information that the State failed to disclose at trial, and an argument that the instructions to the jury concerning the definition of "reasonable doubt" were unconstitutional under a 1994 United States Supreme Court case. The trial court denied the Petitioner relief on the grounds that the Middlebrooks and Brady issues had been previously determined and that the third issue was without merit.

The Petitioner now appeals the dismissal of his petition by the trial court. He argues that the Middlebrooks and Brady issues have not been “previously determined” by the United States District Court and that the third issue does have merit.

### **I. Middlebrooks and Brady Issues**

The Petitioner’s first issue is that the United States District Court’s interlocutory order did not “previously determine” the Middlebrooks and Brady issues brought by the Petitioner in his petition for post-conviction relief. This issue is further divided into two sub-issues. His first sub-issue is that the District Court was not a court of competent jurisdiction to rule on the Middlebrooks issue. The second sub-issue is that the District Court’s interlocutory order was not a ruling on the merits after a full and fair hearing.

#### **A.**

We will first address whether the District Court was a court of competent jurisdiction to decide the Middlebrooks issue. The District Court submitted a Memorandum Opinion concerning the claims to be dismissed and addressed the Middlebrooks issue in this memorandum opinion. The District Court stated:

Felony Murder Aggravator Violates Eighth Amendment The petitioner alleges that the imposition of capital punishment in his case violates the Eighth Amendment because the felony murder aggravator found by the jury is invalid under the holding in State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), cert. granted, \_\_\_ U.S. \_\_\_, 113 S.Ct. 1840 (1993), cert. dismissed, \_\_\_ U.S. \_\_\_, 114 S.Ct. 651 (1993). Under Tennessee law, use of the felony murder aggravating circumstance to impose capital

punishment is invalid under certain circumstances. The Tennessee Supreme Court has held that:

[W]hen the defendant is convicted of first-degree murder solely on the basis of felony murder, the aggravating circumstance set out in Tenn. Code Ann. §§ 39-2-203(l)(7) (1982) and 39-2-203(l)(7) (1991), does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution because it duplicates the elements of the offense.

State v. Middlebrooks, *supra*, at 346 (emphasis supplied).

The Court first notes that there is no constitutional infirmity when a jury renders a general verdict of guilty of first degree murder where both premeditated and felony murder are submitted to the jury, even though the verdict does not indicate whether the defendant has been found guilty of premeditated or felony murder. Schad v. Arizona, 115 L.Ed. 2d. 555, 574 (1991). Further, it does not appear that the verdict itself is infirm under state law; state law provides that a general verdict of guilty is sustainable if any one count in the indictment is sustained by proof. T.C.A. § 40-18-111. See also State v. Coe, 655 S.W.2d 903 (Tenn. 1983), cert. denied, 464 U.S. 1063 (1984). In the petitioner's case, both premeditated and felony murder were, in fact, submitted to the jury.

The essence of the petitioner's argument is that the Eighth Amendment requires this court to completely exclude premeditation as a basis of liability for first degree murder in the general verdict, and to presume that the petitioner was convicted solely on the basis of felony murder. A careful review of the record shows there is sufficient proof of premeditation, so that this Court is unable to exclude premeditated murder as a basis for the jury's verdict of first degree murder. Therefore, Middlebrooks does not apply to invalidate the felony murder aggravating circumstance in his case because the record does not show that the petitioner was convicted solely on the basis of felony murder.

If the felony murder aggravator is not invalid under state law, then the Eighth Amendment has not been violated through its use to impose a capital sentence. Lowenfeld [sic] v. Phelps, 484 U.S. 231, 246-47 (1988) (Use of an aggravating circumstance which duplicates an element of the capital offense to impose the death penalty is not invalid under the federal constitution). This claim will be dismissed.

The Petitioner argues in his brief that the District Court was not competent to rule on the validity of the Petitioner's death sentence because the sentence was based on an aggravating circumstance that was invalid as a matter of state law. He argues that in such a case the District Court must remand to a state court to reweigh the factors. While we agree that this is a correct statement of law, we believe it does not apply to the case sub judice, because application of the aggravating circumstance is not invalid under Middlebrooks and thus, no reweighing is required.

We conclude that the application of the aggravating factor is not invalid in the case sub judice. The Tennessee Supreme Court restricted the invalidity of the felony murder aggravating circumstance to a conviction based solely on felony murder. Middlebrooks, 840 S.W.2d at 346. As stated above in the District Court's opinion, the Petitioner's first degree murder conviction was not based solely on felony murder, but rather on a combination of felony and premeditated murder.

This court has stated:

When a defendant is convicted of felony murder in this state, the underlying felony may not be used as an aggravating circumstance in the death penalty phase of the trial. See State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), cert. dismissed, \_\_\_ U.S. \_\_\_, 114 S.Ct. 651, 126 L.Ed. 555 (1993); Tenn. Code Ann. § 39-13-202(a)(1) and (2). The felony may be used, however, when the defendant has been found guilty of premeditated first degree murder. Thus, while a merger of these two offenses is not error, the issue of whether the underlying felony may be used in the death penalty phase under our state constitutional guidelines has not yet been resolved.

State v. Zirkle, 910 S.W.2d 874, 889-90 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1995). This court did not address the specific question raised in this case because the Zirkle case did not involve the application of the death penalty where the defendant had been convicted of both felony murder and first degree murder.

We will address the question as to whether the merger of first degree murder and felony murder preclude the application of the felony aggravating factor. As stated above, there is no constitutional violation when a defendant is convicted of a combination of felony murder and premeditated murder. Schad v. Arizona, 501 U.S. 624, 644 (1991). Therefore, the conviction can stand as a conviction for first degree murder based on both felony murder and premeditated murder. Middlebrooks applies only when the conviction is solely for felony murder. Because the Petitioner was convicted of a combination of felony murder and premeditated murder, as opposed to felony murder alone, Middlebrooks would not apply.

The holding in Middlebrooks does not apply to invalidate the aggravating factor and thus does not require a reweighing of the aggravating factors. No remand to the state court was necessary. Therefore, the District Court had jurisdiction to rule on the application of Middlebrooks in the case sub judice. We conclude that the United States District Court previously determined this issue, and did so correctly.

This issue is without merit.

**B.**

We now turn to the question of whether the District Court's Interlocutory Order concerning the Middlebrooks and Brady issues constitutes a ruling on the merits after a full and fair hearing, and therefore, whether these issues have been previously determined by the District Court. Tennessee Code Annotated section 40-30-112(a) reads, "A ground for relief is 'previously determined' if a court of competent jurisdiction has ruled on the merits after a full and fair hearing."

We have already determined that the District Court was a court of competent jurisdiction to rule on the Middlebrooks claim. The question now before us is whether the Petitioner was afforded a full and fair hearing.

In a recent case, House v. State, 911 S.W.2d 705 (Tenn. 1995), the Tennessee Supreme Court addressed the question of what constitutes a full and fair hearing. In House, the supreme court stated, "We conclude that a 'full and fair hearing' sufficient to support a finding of previous determination occurs if a petitioner is given the opportunity to present proof and argument." Id. at 714.

It is apparent from the District Court's order and detailed memorandum opinion that the court had the record of the Petitioner's trial before it. The court could not have made the rulings without the record. In the order addressing the Brady issue, the court mentions the brief it ordered from the Petitioner on the Brady issue. On the Brady issue, at the request of the District Court, the Petitioner submitted a brief in answer to the State's Motion for Summary Judgment, and the District Court reviewed the record. Therefore, under the

standard enunciated in House, the Brady issue was accorded a full and fair hearing.

Moreover, the same is true as to the Middlebrooks issue. “Notice pleading” is not sufficient for writ of habeas corpus petitions. Aubut v. Maine, 431 F.2d 688, 689 (1st Cir. 1970). Thus, we can safely assume from the requirement that pleadings must have more substance than “notice pleadings” and from the detail of the District court’s order that the Petitioner was given ample opportunity to argue his position. Therefore, we conclude that there was also a full and fair hearing of the Middlebrooks issue under House.

Therefore, this issue is without merit.

## **II. Jury Instruction**

The Petitioner next argues that the trial court’s instructions on reasonable doubt at the guilt and sentencing phases of his trial violated his due process rights under the United States Constitution. The Petitioner contends that the phrase “moral certainty” used in the instructions allowed a finding of guilt and aggravating circumstances based on a degree of proof below that which is constitutionally required.

The Petitioner bases his claim upon the recent United States Supreme Court decision in Victor v. Nebraska, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1239 (1994) and its companion case, Sandoval v. California, *id.* He argues that Victor set forth a new constitutional rule that should be retroactively applied. The State disagrees and

argues that Victor did not announce a new rule “so novel that [the Petitioner] could not have raised it on direct appeal or in his first post-conviction proceeding.” Thus, the State contends that the Petitioner waived this claim by failing to present it at an earlier proceeding, and additionally, that the issue is time-barred because it was not brought within the statute of limitations.

The Post-Conviction Procedure Act provides relief to a Petitioner who has suffered an abridgement of any right guaranteed by the United States or Tennessee Constitutions. Tenn. Code Ann. § 40-30-105.<sup>1</sup> The applicable act provided a three-year statute of limitations from the date of the final action of the highest state appellate court to which an appeal was taken or the petition must be dismissed as being time-barred. Tenn. Code Ann. § 40-30-102. However, the petition will not be barred if the Petitioner is asserting a violation of a right that was not recognized as existing at the time if either constitution requires retrospective application of that right. Tenn. Code Ann. § 40-35-105.

The State asserts that this was not a novel issue, and therefore, it is waived because the Petitioner did not raise it on direct appeal or in his first petition for post-conviction relief. The Petitioner contends that the issue is not waived because the legal basis for his claim was not available prior to 1994, when Victor was decided. The Petitioner is correct that Victor was handed down well after the statute of limitations had passed. He apparently argues that he is properly before this court because the right resulting from Victor was not

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<sup>1</sup>This act was repealed, effective July 1995, and recodified under Tennessee Code Annotated section 40-30-201, et seq.

previously recognized. If so, the Petitioner is not precluded by either a prior waiver of the issue or by the statute of limitations.

In order to determine whether due process precludes application of the statute of limitations under Burford v. State, 845 S.W.2d 204 (Tenn. 1992), we must first determine whether Victor and Sandoval created a new constitutional right; if so, then we must determine whether such right should be applied retroactively. Meadows v. State, 849 S.W.2d 748 (Tenn. 1993).

In Meadows, the Supreme Court stated that “a case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” Id. at 751 (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)(emphasis in original)). Retroactive application of a new rule of federal constitutional law must be given retroactive application to cases on collateral review if (1) the rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (2) the rule requires the observance of procedures implicit in the concept of ordered liberty. Teague v. Lane, 489 U.S. at 307.<sup>2</sup>

The issue of whether a petitioner is barred by the statute of limitations from challenging the constitutionality of a reasonable doubt instruction was raised in Pettyjohn v. State, 885 S.W.2d 364 (Tenn. Crim. App.), perm to appeal denied, id. (Tenn. 1994). In Pettyjohn, this Court held that the instruction did not violate

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<sup>2</sup>In Meadows, the Supreme Court held that “a new state constitutional rule is to be retroactively applied to a claim for post-conviction relief if the new rule materially enhances the integrity and reliability of the fact finding process of the trial.” 849 S.W.2d at 755. Here, the decision which the Petitioner claims sets forth a new constitutional rule requiring retroactive application is federal. Thus, we are bound by federal retroactivity analysis. See Great Northern Ry Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364-65 (1932).

due process under Cage v. Louisiana, 498 U.S. 39 (1990) and Sullivan v. Louisiana, 508 U.S. 275 (1993), which preceded Victor and Sandoval. Pettyjohn v. State, 885 S.W.2d at 366. While this Court held that the trial court correctly dismissed the petition as barred by the three-year statute of limitations, application of the two-prong analysis set out in Teague was unnecessary because the Court found that the specific jury instruction did not violate due process under Cage. We too find that this analysis is unnecessary because on the merits, the Petitioner's claim does not present a constitutional violation.

A longstanding tenet of criminal law is that the government must prove every element of a charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). The due process provisions of our state and federal constitutions require that the reasonable doubt standard be used, but they do not specify that any particular definition or form of words be used in instructing the jury on the government's burden of proof. Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." Holland v. United States, 348 U.S. 121, 140 (1954).

In Victor, the Court stated that the proper inquiry for a jury instruction is not whether the instruction "could have" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it. 114 U.S. at 1242 (citing Estelle v. McGuire, 502 U.S. 62, 72 n. 4 (1991)).

In the case sub judice, the trial court instructed the jury during the guilt phase as follows:

The law presumes that the defendant is innocent of the charges against him. This presumption remains with the defendant throughout every stage of the trial, and it is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

The state has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden never shifts but remains on the state throughout the trial of the case. The defendant is not required to prove his innocence.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible, or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition [sic] of proof requisite to constitute the offense.

At the sentencing phase, the trial court again defined reasonable doubt when instructing the jury that the State must prove statutory aggravating circumstances beyond a reasonable doubt:

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of your findings. You are the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence presented.

Tennessee appellate courts have consistently held that similar instructions passed constitutional scrutiny. State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994); Pettyjohn v. State, 885 S.W.2d 364, 365-66 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1994); State v. Hallock, 875 S.W.2d 285, 294 (Tenn. Crim. App. 1993), perm. to appeal denied, id. (Tenn. 1994); State v. Gary Lee Blank, No. 01C01-9105-CC-00139, Williamson County, slip op. at 5-6 (Tenn. Crim. App., Nashville, filed Feb. 26), applic. dismissed (Tenn. Filed May 4, 1992).

The United States Supreme Court has found similar results, holding in only one case that a definition of reasonable doubt violated the Due Process Clause of the Constitution. Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam). There, the court instructed the jury

[A reasonable doubt] is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*.

Cage, 498 U.S. at 40 (emphasis added by the Supreme Court). The Supreme Court determined that the words “substantial” and “grave” suggest a higher degree of doubt than required for acquittal under the reasonable doubt standard. Id. at 41. Moreover, when these words were considered with the term “moral certainty” rather than evidentiary certainty, a danger arose that a jury could find a defendant guilty based on a lesser degree of proof than required by the Due Process Clause. The Court subsequently reversed the Defendant’s conviction.

The United States Supreme Court considered similar due process challenges to jury instructions defining reasonable doubt in Victor v. Nebraska, \_\_\_ U.S. \_\_\_, 114 S.Ct. 1239 (1994), and the companion case of Sandoval v. California, id. In analyzing the relationship of reasonable doubt to the “moral certainty” phrase, the Court upheld the use of the “moral certainty” language when the complete instruction lends context to the phrase.

The Court held that, when taken as a whole, both instructions correctly conveyed the concept of reasonable doubt and the degree of proof that is constitutionally required to acquit or convict a defendant. The instructions given in Sandoval's case defined reasonable doubt as "not a mere possible doubt," but one "depending on *moral evidence*," such that the jurors could not say they felt an abiding conviction, "*to a moral certainty*," of the truth of the charge. Id. at 1244. The instructions in Victor's case defined reasonable doubt as one that would not let a juror "have an abiding conviction, *to a moral certainty*, of the guilt of the accused," and as an "*actual and substantial doubt* arising from the evidence, from the facts or circumstances shown by the evidence." Id. at 1249.

In Victor, the Court traced the origins of the term "moral certainty" in relation to the reasonable doubt standard. The phrase originated in the mid-nineteenth century and meant a "state of subjective certitude about some event or occurrence." Id. at 1246. Thus, the Court explained, a jury must rely on evidence to a "moral certainty," because absolute certainty is unattainable in matters relating to human affairs. Id. The Court found that standing alone, the phrase might be construed by modern juries to mean something less than the very high level of proof constitutionally required in criminal cases. Although the Supreme Court found the "moral certainty" phrase to be antiquated and discouraged its use, the Court said that if the complete jury charge added context to the phrase, then the instructions would not be deemed unconstitutional. Id. at 1246-47.

The Victor court further distinguished Cage on these grounds, reasoning that the Cage instruction simply told the jurors that they had to be morally certain

of the defendant's guilt, without providing any instruction to lend meaning to the nebulous phrase. In the instructions from both Sandoval and Victor, the Court noted that the jurors were explicitly told that their determinations were to be based on the evidence in the case. Accordingly, there was no reasonable likelihood that the jury would have understood moral certainty to be disassociated from the evidence in the cases, nor did the term suggest a standard of proof lower than due process required. In Victor's case, the Court noted that "[i]nstructing the jurors that they must have an abiding conviction of the defendant's guilt does much to alleviate any concerns that the phrase moral certainty might be misunderstood." Id. at 1250-51. The Supreme Court could find no reasonable likelihood that the jurors understood the reference to moral certainty to allow a conviction on an insufficient standard or on factors other than the State's proof. Id. at 1251.

In the present case, the Petitioner makes the same argument that was rejected in Victor. He contends that the instruction given at trial suffers from the same constitutional infirmities identified in Cage and Victor, namely a tendency to confuse and mislead the jury as to the meaning of reasonable doubt and to lessen the State's burden of proof. He also asserts that the instructions were unconstitutional because they did not add context to the phrase "moral certainty" by giving reference to evidentiary certainty or to some other common sense benchmark. Thus, he argues that the instructions could easily lead a juror to conclude that "moral certainty" was based on ethics rather than evidence, and such standard could be satisfied with something less than the higher probability of guilt required by due process.

As Victor clarifies, the phrase “moral certainty” is not constitutionally inappropriate; rather, it must be scrutinized in context with the complete jury charge. Again, the proper inquiry of the instruction’s constitutionality is whether there exists a reasonable likelihood that the jury has applied the challenged instructions in a way that would lower the State’s burden of proof, not whether the jury could have done so. Estelle v. McGuire, 502 U.S. at 72 n.4.

In the case before us, the instructions told the jury that reasonable doubt did not include a “captious, possible, or imaginary doubt,” but was one “engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt.” The instruction clearly stated that the jury must consider the proof, that the burden of proof was on the State, and that the proof required a moral certainty as to every element of the offense. The instructions explained that absolute certainty was not required.

Moreover, the instructions here did not contain the objectionable language of “grave uncertainty” and “actual substantial doubt” found in Cage, which overstated the quantum of doubt necessary for acquittal; rather, they only contained the “moral certainty” language. This court has held that Cage does not mandate the abandoning of the “moral certainty” terminology. State v. Hallock, 875 S.W.2d 285, 294 (Tenn. Crim. App. 1993), perm. to appeal denied, id. (Tenn. 1994). Likewise, the Tennessee Supreme Court has further held that the “use of the phrase ‘moral certainty’ by itself is insufficient to invalidate an instruction on the meaning of reasonable doubt.” State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994). The phrase is permissible if the context in which the instruction is

given “clearly convey[s] the jury’s responsibility to decide the verdict based on the facts and the law.” Id.

We conclude that the instructions given in this case conveyed the jury’s responsibility to make a determination based on the facts, not on an ethical values system. We also conclude that the instructions were not misleading or confusing to the jury. Rather, the instructions correctly conveyed the standard of reasonable doubt and the degree of proof necessary to convict after examination of the evidence. We conclude that the instructions as a whole did not make it reasonably likely the jury construed the words “moral certainty” to be a lesser standard of proof than required by due process or as allowing conviction upon factors other than the evidence. Thus, we find this issue to be without merit.

The judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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JOE B. JONES, PRESIDING JUDGE

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JOHN H. PEAY, JUDGE